IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 8 OF 2000

Bank of Baroda,
A Body Corporate
Constituted under
the Banking Companies
(Acquisition & Transfer
of Undertaking Act), 1970,
having its Head Office at
Mandovi, Baroda, Gujrat
State and a Branch Office
at Vasco da Gama, Mormugao,
Goa amongst other places. ... Appellant/Original Plaintiff.

versus

1. Mr. Avdoot Bhagwant Naik,
   major of age, H.No.167,
   Damodar Niwas,
   Near Govt. Primary School,
   Sancoale, P.O. Cortalim,
   Goa.

2. Mr. Santosh Govind Naik,
   major of age, (H.No. not
   known),
   Near Govt. Primary School,
   Sancoale, P.O. Cortalim,
   Goa.

3. Mrs. Premabai B. Naik,
   major of age,
   Flat No.K-2, (H.No. not
   known),
   Greenland Hsg. Society,
   Campal, Panjim, Goa.

4. Mr. Prabhu C. Patel,
   major of age,
   H.No. not known,
   A-7, IVth floor,
   Pushpanjali Building,
   Opp. Goa Sahakar Bhandar,
   Vasco da Gama,
   Goa, 403 802. ... Respondents/Original Defendants.

Mrs. S. S. Naik, Advocate for the Appellant.

Mr. R. G. Ramani, Advocate for Respondent No.2.

CORAM : S. A. BOBDE &
N. A. BRITTO, JJ.

DATE : 8TH JUNE, 2004.

ORAL JUDGMENT(PER N.A.BRITTO, J.)

The Plaintiff in Special Civil Suit No.86 of 1996 has filed the present Appeal against the Judgment/Decree dated 31st December, 1998, of the learned Civil Judge, Senior Division, Vasco-da-Gama, decreeing the suit only partly against Defendant Nos.2 to 4.

2. Some more facts are required to be stated to dispose of the present Appeal.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

4. There is no dispute that Defendant No.1 was sanctioned and disbursed a loan of Rs.6,50,000/- for the construction of a trawler to be known as 'JAI AMBE'. The said loan was repayable in sixty instalments of Rs.16,250/- each. However, the admitted position is that not a single instalment was paid by Defendant No.1, as a result of which, the loan was recalled first by notice dated 22nd September,1995 and then by legal notice dated 27th September, 1995, and

thereafter the Plaintiff filed the said suit for the recovery of Rs.13,26,231/- with further interest at the rate of 18.75% per annum with a quarterly rests from the date of filing of the suit.

5. The said suit has been decreed by the learned Civil Judge as far as Defendant No.1 is concerned but as far as Defendant Nos. 2 to 4 are concerned, the same has been decreed only to the extent of Rs.2,76,231/- with interest at the rate of 18.75% per annum from the date of the suit till payment.

6. There is no dispute that at the time of sanction of the said loan, the Defendants executed several documents, inter alia, a demand pro note (Exh.P.W.1/17), an agreement of mortgage of the trawler(Exh.P.W.1/18), an agreement of hypothecation of goods (Exh.P.W.1/19) and a Deed of Guarantee by Defendant Nos.2 to 5(Exh.P.W.1/22).

7. The Defendant No.2 resisted the said suit of the Plaintiff, inter alia, pleading that he agreed to stand as surety on account of security of fixed assets furnished to the Plaintiff. Defendant No.2 further pleaded that in case the Plaintiff failed to realise the dues from the sale of the trawler and the flat(purported to have been mortgaged by Defendant No.3

by deposit of title deeds) the Defendant No.2 would stand discharged to the extent of the value of the said securities. The Defendant No.2 also pleaded that it was necessary for the Plaintiff to have sold the fishing nets, the trawler and the said flat and realised the amount towards the payment of the debt. However, the Defendant No.2 in his evidence before the Court only stated that he was not liable to pay the debt as the same ought to have been recovered by the Plaintiff from the securities furnished by and on behalf of Defendant No.1.

8. The learned Civil Judge came to the conclusion that although the loan was disbursed to Defendant No.1 on 3rd November, 1993, the Plaintiff had not taken any steps to take possession of the said trawler and due to the said omission of the Plaintiff, the said trawler was sold without the consent of Defendant Nos.2 to 4 by Defendant No.1 to one Oscar Barreto and thus, the guarantors, Nos.2 to 4 were discharged to the extent of Rs.10,50,000/- which was the value of the said trawler. At this stage, it may be noted that the value of the said trawler when it was constructed was given by the Plaintiff to be Rs.10,51,000/- while according to Defendant No.1 its value was Rs.10,50,000/-. As far as the mortgage of the said flat was concerned, the learned Civil Judge

came to the conclusion that the said mortgage could not be created as there was no notification issued in terms of Section 58(f) of the Transfer of Property Act, 1882 concerning the town of Vasco-da-Gama.

9. As already stated, the Plaintiff has challenged the Judgment/Decree of the learned Civil Judge to the extent that the said Judgment and Decree is not co-extensive with the decree passed against the Defendant No.1.

10. Mrs. S. S. Naik, learned Counsel on behalf of the Plaintiff, has placed reliance on Sections 126, 127 and 128 of the Indian Contract Act, 1872 and has also placed reliance on the cases reported in **M/s. M. Ramnarain Pvt.Ltd. and another v. The State Trading Corporation of India Limited** (AIR 1988 Bombay 45), **Kailash Nath Agarwal and others** v. **Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another**(2003) 4 SCC 305 and **State Bank of India** v. **Messrs. Indexport Registered and others**(AIR 1992 SC 1740).

11. On the other hand, Mr. R. G. Ramani, learned Counsel on behalf of Defendant No.2(the other Defendants have not contested this Appeal) has tried to defend the said Judgment/Decree by placing reliance on

Sections 135, 139 and 141 of the Indian Contract Act, 1872. Mr. Ramani, learned Counsel has also placed reliance on the case reported in AIR 1968 SC 1432.

12. A brief reference to the relevant Sections of the Indian Contract Act, 1872 (Act, for short) relied upon by the learned Counsels will not be out of context.

13. Section 126 defines a 'contract of guarantee', 'surety', 'principal debtor' and 'creditor' and states that a 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

14. Section 127 deals with consideration for guarantee.

15. Section 128 deals with the Surety's liability, and, provides that the liability of the surety is co-extensive with that of the principal

debtor, unless it is otherwise provided by the contract.

16. Section 135 deals with discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor and it states that a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

17. Section 139 of the Act deals with the discharge of surety by creditor's act or omission impairing surety's eventual remedy and it provides that if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

18. Section 141 of the Act which is far more important and on which the entire controversy is sought to be rested, reads as follows:-

> **"141 - Surety's right to benefit of creditor's securities.-** A surety is entitled to the

> benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security" (Emphasis supplied).

19. The contention of Defendant No.2 appears to be that the Plaintiff allowed the Defendant No.1 to lose the said security. As far as this factual aspect is concerned, the learned Civil Judge had framed Issue No.2 which reads as follows:-

> "2. Whether the Defendant No.1 proves that the trawler was sold to Oscar Barreto with the consent of the Plaintiff?"

20. The learned Civil Judge answered the said Issue in the negative and against Defendant No.1, and in our opinion, the said finding of the learned Civil Judge cannot be faulted. No doubt, Defendant No.1 in his evidence before the Civil Judge stated that he gave the fishing trawler to one Oscar Barreto by virtue of a written agreement. However, Defendant No.1(D.W.1) neither examined the said Barreto to support his statement nor produced the said agreement under which he gave the said trawler to the said Barreto. Defendant No.1(D.W.1) also did not explain if the value

of the said trawler was Rs.10,51,000/- as to why he had sold the same for such a paltry sum of Rs.3,00,000/- only. Defendant No.1 also did not explain as to why he did not pay a single pie into his loan account with the Plaintiff. On the contrary, Defendant No.1 in his cross-examination admitted that the said trawler had continued to remain on his name and not only that he also admitted that the sale of the said fishing trawler to the said Oscar Barreto was not completed. As against the said evidence of Defendant No.1 which was otherwise very shaky and filled with contradictions, on behalf of the Plaintiff, it was stated by their Manager that the said trawler was inspected by the Plaintiff even on 14th May, 1996 and 23rd June, 1997, the inspection reports of which were produced by him and regard to which there was no dispute. In other words, the version of Defendant No.1 that he had sold or parted with the said trawler to the said Barreto is a version which could not be accepted. Defendant No.1, had however admitted that the Plaintiff had not permitted him to sell the trawler. On facts, therefore, the conclusion of the learned Civil Judge on Issue No.2 could not be faulted.

21. Assuming for a moment that the trawler was parted by Defendant No.1 as claimed by him, in favour of the said Barreto, the question before the Court

would be whether the provisions of Section 141 of the Act were at all attracted? As said before, it is an admitted position that it was stated by Defendant No.1 that he had given the said trawler to the said Barreto without the consent of the Plaintiff.

22. In the case of **Amrit Lal Goverdhan Lalan(dead) by his legal representatives** v. **State Bank of Travancore and others**(AIR 1968 SC 1432) reliance on which was placed by Mr. Ramani, the Hon'ble Supreme Court was dealing with a case where the grant of cash credit facility of Rs.1,00,000/- was secured by goods pledged with the Bank under an agreement dated 27th February, 1956. The Respondents had agreed that if they failed or neglected to repay the Bank on demand the amount due to the Bank, the Bank was entitled, without any notice to them to sell the goods and to apply the net proceeds towards liquidation of the debt. By virtue of Clause 3 of the said agreement the borrowers were given liberty, with the consent of the said Bank, from time to time to withdraw the goods pledged to the Bank provided the advance value of the said goods was paid into their account or goods of similar nature and equal value were substituted for goods withdrawn. The borrowers were also required to furnish to the Bank statements and returns of the cost and market value of the securities. They were further

required to maintain in favour of the Bank a margin of 10% at Bank's discretion between the market value from time to time of the securities and the balance due to the Bank for the time being, etc. Upon, failure of the Respondents to pay the amount due, the goods pledged were sold and the proceeds were credited to the account of the Respondents. Upon evidence adduced it was proved that there was shortage of goods of the value of Rs.35,690/- brought about by the negligence of the Bank.

23. In the above context, the Hon'ble Supreme Court with reference to Section 141 of the Indian Contract Act, 1872 observed that "it is true that Section 141 of the Indian Contract Act has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of surety. But subject to this variation, Section 141 of the Indian Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him(Emphasis supplied).

24. The Hon'ble Supreme Court further observed that upon the evidence adduced by the parties in that

case, they were satisfied that there was shortage of the goods of the value of Rs.35,690/- brought about by the negligence of the Bank or for some other reason and to that extent there must be deemed to be a loss by the Bank of the securities which the Bank had at the time when the contract of surety was entered into and invoking the principle of Section 141 of the Indian Contract Act the Apex Court discharged the liability of the surety to the Bank to the extent of Rs.35,690/-.

25. In the case of **M/s. M. Ramnarain Pvt.Ltd. and another** v. **The State Trading Corporation of India Limited**(AIR 1988 Bombay 45) a Division Bench of this Court observed that the failure to preserve the security would lead to the surety being discharged from the liability and since the Corporation had failed to preserve the bills of exchange by not instituting any proceedings against Nichol - the acceptor till the expiry of the period of limitation, the right available to the drawer to proceed against the acceptor was irrevocably lost and consequently the liability of Defendant No.1 to pay the amount under the letter dated 18th July, 1967 stood discharged and such liability of Defendant No.1 stood discharged, it followed that the liability of Defendant No.2, who was the guarantor, would also be discharged.

26. The case of **State Bank of India** v. **Messrs. Indexport Registered and others**(AIR 1992 SC 1740) was a case pertaining to execution, and the Hon'ble Supreme Court overruled its earlier decision, and held that the Decree Holder cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and then to proceed against the guarantor. This observation is an answer to the contention of Defendant No.2 that the Plaintiff should first proceed to recover the dues from the securities furnished by the Defendants.

27. In our opinion, no fault could be found with the finding of the learned Civil Judge that no valid mortgage by Defendant No.3 was created in respect of the flat in the absence of the Notification covering the town of Vasco-da-Gama issued under Section 58(f) of the Transfer of Property Act,1882.

28. Although, the word mortgage is used in the agreement Exh.P.W.1/18, the parties are in agreement that the said agreement was in the nature of a Deed of Hypothecation by virtue of which the actual and physical possession of the said trawler had remained with Defendant No.1, constructive or equitable possession being that of the Plaintiff. It is common knowledge that hypothecation of goods is a concept

which is not expressly provided in the law of contract but is accepted in the law of merchant by long usage or practice. Hypothecation is unlike pledge. The incidents of pledge are distinct and different from the incidents of hypothecation. In hypothecation the actual and physical possession remains with the hypothecator and it is only the constructive or notional or equitable possession which remains with the hypothecatee. In pledge, the actual and physical possession and control is given to the pledgee by the pledgor of the goods pledged. Since in hypothecation the actual and physical possession remains with the hypothecator, a wide door always remains open to the hypothecator to deal with the goods without reference to the hypothecatee. In the case at hand, if at all, Defendant No.1 parted away with the possession of the said trawler in favour of the said Oscar Barreto and admittedly without the consent of the Plaintiff, the Plaintiff as creditor certainly could not be blamed either for having lost the said trawler or diminishing its value or utility.

29. This being the position in the case at hand, the ratio laid down by the Hon'ble Supreme Court in the case of **Amrit Lal Goverdhan Lalan(dead) by legal representative v. State Bank of Travancore and others** (AIR 1968 SC 1432) would be clearly inapplicable.

30. Lastly it may be stated that the first instalment towards the loan was payable on 1st January, 1994. The loan was recalled by notice dated 22nd September, 1995 and the suit filed on 29th October, 1996. There was some delay in recalling the loan or filing of the suit, after defaults were committed by Defendant No.1. However, this could not be considered to be a "promise to give time" to Defendant No.1 as contemplated by Section 135 of the Indian Contract Act. It is to be noted that by virtue of agreement of guarantee – Exh.PW1/22 the Defendant Nos. 2 to 4 had agreed and guaranteed to the Plaintiff due payment and discharge on demand of all amounts due and payable to the Plaintiff. Since the liability of the sureties is co-extensive with the liability of the principal debtor, in our opinion, the learned Civil Judge ought to have passed the decree jointly and severally against Defendant Nos.2 to 4 as well to pay the said amount of Rs.13,26,231/- with pending future interest at the rate of 18.5% per annum from the date of the suit 29th October, 1996.

31. We are of the opinion that the learned Civil Judge could not have faulted the Plaintiff, for an act done by Defendant No.1, namely the sale of the trawler, if at all that was done and which admittedly was done without the consent of the Plaintiff.

32. In view of the above, the Appeal is bound to succeed. Consequently, the Judgment and Decree as against the Defendant Nos.2 to 4 is hereby set aside and the Defendant Nos. 2 to 4 are now hereby directed to pay jointly and severally to the Plaintiff along with Defendant No.1 the said sum of Rs.13,26,231/- with pending and future interest at the rate of 18.75% per annum with quarterly rests from the date of filing of the suit until payment.

S. A. BOBDE, J.

N. A. BRITTO, J.

RD.